



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Pathlab, P.A.  
**File:** B-235380  
**Date:** August 4, 1989

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### **DIGEST**

Protest against nonresponsibility determination is denied where, based on a current negative pre-award survey report, the agency reasonably concluded that protester would be unable to acquire adequate facilities and establish necessary procedures in time to meet solicitation delivery requirements for urgently-needed Human Immunodeficiency Virus testing.

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### **DECISION**

Pathlab, P.A. protests the rejection of its offer under request for proposals No. N00140-88-R-3983, issued by the Department of the Navy for Human Immunodeficiency Virus (HIV) testing for Navy personnel. The protester challenges the Navy's rejection of the firm as nonresponsible.

We deny the protest.

The solicitation requested proposals to provide testing for detection of HIV antibodies in human serum specimens as part of the Navy's response to the threat posed by the Acquired Immune Deficiency Syndrome (AIDS). The solicitation required the contractor to commence furnishing services not later than 15 days after date of contract; it provided for testing an estimated 600,000 specimens in the first contract year, but cautioned that the contractor must have the capability to increase the number of specimens processed by as much as two-fold with 30 days notice.

Pathlab's technical proposal initially was found to be unacceptable but capable of being made acceptable; based upon additional information provided during discussions, the agency ultimately determined the firm's technical proposal

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to be acceptable. Since Pathlab had submitted the lowest priced proposal, the Navy conducted a pre-award survey with respect to Pathlab's overall responsibility to perform the work in question. Based on an inspection of Pathlab's facilities, the pre-award survey team found Pathlab to be unsatisfactory as to technical capability, production capability, and quality assurance, and therefore recommended against award; subsequently, the contracting officer determined Pathlab to be nonresponsible. When Pathlab's request for a copy of the pre-award survey and an opportunity to discuss the findings prior to award was denied, Pathlab filed this protest with our Office. The agency has since determined, pursuant to the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(c) (Supp. IV 1986), that urgent and compelling circumstances which significantly affect the interests of the United States do not permit waiting for our decision before making award.

Pathlab argues that the nonresponsibility determination was inconsistent with the finding that its proposal was technically acceptable, and maintains that the determination was unreasonable and made in bad faith, so as to preclude award to it. The protester contends that the refusal of the contracting officer to discuss the pre-award survey further evidences the agency's bad faith and deprived Pathlab of its due process rights.

The determination of a prospective contractor's responsibility rests within the broad discretion of the contracting officer, who in making that decision must of necessity rely primarily on his or her business judgment. Venusa, Ltd., B-217431, B-217432, Apr. 22, 1985, 85-1 CPD ¶ 458. While the determination should be based on fact and reached in good faith, it ultimately will be left to the discretion of the contracting agency, which must bear the brunt of any difficulties during performance. Urban Masonry Corp., B-213196, Jan. 3, 1984, 84-1 CPD ¶ 48. Because of this broad discretion, our Office generally will not question a negative determination of responsibility unless the protester can demonstrate that the agency acted in bad faith or lacked a reasonable basis for the determination. See Fund for Equal Access to Society, B-228167, Jan. 20, 1988, 88-1 CPD ¶ 54.

The contracting officer based his determination here on the pre-award survey conducted at Pathlab's laboratory, which found Pathlab to be unsatisfactory as to technical and production capability and quality assurance. Although the pre-award survey team determined that Pathlab had an adequately designed and equipped clinical testing facility to handle its current volume of testing, and some members of

the team were convinced that the firm could meet certain of the solicitation requirements (e.g., the packaging and shipping requirements), the ultimate recommendation of the pre-award survey team was against award on the basis that the firm lacked the current capacity to handle the scheduled work load under the contemplated contract and could not be sure of acquiring the required additional capacity in time to commence performance within 15 days of award. Pathlab's largest contract, only recently awarded (in December of 1988), was for only 65,000 to 70,000 HIV tests per year, less than 12 percent of the estimated requirement here for testing 600,000 specimens in the first contract year (and less than 4 percent of the maximum permissible volume under the contemplated contract of 1,800,000 specimens the first year).

Pathlab never claimed it had the current capacity to handle the required work load under the contemplated contract. Rather, Pathlab indicated that, if awarded the contract, it would order new equipment to meet the contract requirements. The pre-award survey team, however, concluded that the new equipment could not be brought into full operation within the permitted 15-day start-up period, since it found that Pathlab did not possess any of the three automatic testing stations required to perform the contract; in this regard, the pre-award survey team was advised by Pathlab's proposed source for new automatic testing stations that delivery, installation and start-up would take 3-1/2 to 4-1/2 weeks. Further, although Pathlab proposed to construct a walk-in freezer to meet the requirement for the frozen storage of specimens, and a vendor advised that a freezer could be installed within 1 week, the pre-award survey team noted that before any of the new equipment could be installed in the designated location Pathlab would have to relocate two existing laboratories. In addition, the pre-award survey team found that Pathlab would need both to develop specific operating procedures and quality assurance protocols for the newly installed equipment and, since its current procedures fell short of the solicitation requirements, to modify its overall operations to conform to the solicitation quality assurance requirements.

Pathlab did propose a supplier of HIV screening reagents, Genetic Systems Corporation, to provide any necessary production support. The pre-award survey team recognized that Pathlab's supplier could be an alternate source for the necessary automatic testing equipment; it concluded, however, as did the contracting officer, that even with

Pathlab's reliance on Genetic Systems, the government nevertheless could not be sure that Pathlab would have the capacity to perform on schedule, and that the risk that the firm might be unable to perform was unacceptable due to the critical nature of the testing.

We find the agency's conclusion reasonable. The Federal Acquisition Regulation (FAR) § 9.103(b) provides that in the absence of information clearly indicating that a prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility; in particular, the prospective contractor must demonstrate that it has the necessary technical equipment and facilities, or the ability to obtain them. FAR § 9.104-1(f). The information available to the pre-award survey team and the contracting officer clearly indicated that Pathlab itself would be unable to perform at the required capacity within 15 days of award. Moreover, while Genetic Systems might be able to provide some back-up equipment or services, there has been no showing that it was both committed to and capable of furnishing equipment that would be available for use in time to meet the delivery schedule or services that would comply with the stringent testing requirements in the solicitation. In addition, according to the agency, failure to provide quality, timely testing would seriously impact the Navy health care system, either delaying urgently-needed, critical testing, or forcing Navy medical treatment facilities to divert laboratory resources in short-supply from general health care to HIV testing. In these circumstances, we do not think the agency was required to gamble on the possibility that Genetic Systems would fill any shortfall in Pathlab's capabilities. See System Dev. Corp., B-212624, Dec. 5, 1983, 83-2 CPD ¶ 644 (nonresponsibility determination proper where based on reasonable doubt about the protester's ability to meet delivery schedule); see generally Products Research and Chemical Corp., B-214293, July 30, 1984, 84-2 CPD ¶ 122.

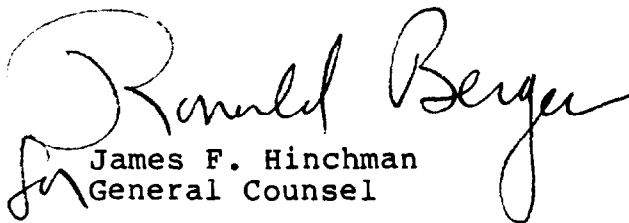
The fact that Pathlab's proposal was found technically acceptable is not inconsistent with the subsequent determination of nonresponsibility. While the evaluation of technical proposals was based upon the information submitted in the proposals, see Ingersoll-Rand Co.; Trilectron Indus., Inc., B-232739 et al., Feb. 7, 1989, 89-1 CPD ¶ 124, the nonresponsibility determination here was based upon a pre-award survey that went beyond Pathlab's proposal and included an in-plant survey, to determine whether the

prospective contractor in fact possessed the capability to meet the solicitation requirements.

Pathlab argues that the contracting officer was required to discuss the results of the pre-award survey with it before finding the firm nonresponsible. We disagree. Section § 9.105-3(b) of the FAR, permits, but does not require, the contracting officer to discuss pre-award survey information before determining responsibility. In this regard, responsibility determinations are administrative in nature and do not require the procedural due process otherwise necessary in judicial proceedings. Accordingly, the contracting officer may base a nonresponsibility determination on the evidence in the record without affording the offeror an opportunity to explain or otherwise defend against the evidence. See Oertzen & Co. GmbH, B-228537, Feb. 17, 1988, 88-1 CPD ¶ 158; Firm Reiss GmbH, B-224544, B-224546, Jan. 20, 1987, 87-1 CPD ¶ 72.

The protester's allegation that the Navy was biased against it is totally unsupported in the record. See Contracting Programmers & Analysts, Inc., B-233377.2, Feb. 22, 1989, 89-1 CPD ¶ 190. The nonresponsibility determination was reasonable, and the fact that not all members of the pre-award survey team agreed with all of the conclusions of the pre-award survey, upon which the nonresponsibility determination was based, does not demonstrate bad faith, since responsibility determinations are inherently judgmental and contracting officials acting in good faith can reach opposite conclusions. See generally Automated Datatron, Inc., 68 Comp. Gen. 89 (1988), 88-2 CPD ¶ 481.

The protest is denied.

  
James F. Hinchman  
General Counsel